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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,
Petitioners,

v.

JOHNSON CONTROLS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

BY THE INDUSTRIAL HYGIENE LAW PROJECT

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American Iron and Steel Institute (AISI) v. OSHA, 577 F.2d 825 (1978) .....passim

American Textile Manufacturers Institute v. Donovan, 452 U.S. 490 (1981). 21

American Smelting and Refining Company, (ASARCO) Inc. v. Occupational Safety and Health Review Commission (OSHRC), 746 F.2d 483 (9th Cir. 1984)...23

City of Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702 (1978). 6

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Industrial Union Department, AFL-CIO(IUD) v. Hodgson, 499 F2d 467 (DC Cir. 1974).....passim

IUAW v. Johnson Controls, 886 F.2d 871 (7th Cir. 1989). 5, 14, 15
Jacobsen v. Massachusetts, 197 U.S. 11 (1905).....17

Nashville Gas Co. v. Satty 434 US 136 (1977).....6

OCAW v. American Cyanamid, 741 F2d 444(D.C. Cir. 1984). .....passim

Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). 8, 9

United Steelworkers v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980), cert denied 453 U.S. 913 (1981). .....passim

Wright v. Olin, 697 F.2d 1172 (4th Cir. 1982). 10, 11

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Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (42 U.S.C. 2000-e(k).....9

Nuclear Regulatory Commission Regulations, 10 CFR Sections 19.12-19.32;20.1 et. seq. 18, 19

Occupational Safety and Health Act, 29 U.S.C. sec. 651 et. seq. (1970) 20

Occupational Safety and Health Act Section 5a(1), 29 U.S.C. sec.654 (a) (1970).....20, 23

Occupational Safety and Health Administration, Lead Regulations. 43 FR 52952 (1978). 22

Other Authorities

American Conference of Government Industrial Hygienists, *Documentation of the Threshold Limit Values and Biological Exposure Indices* 5th Ed. Cinn. Ohio 1986.....21

39 *American Jurisprudence* 2d Health, Secs. 20;22 (1968 & Supp. 1990). 17

"Sterilization or Your Job", Comments of Hon. Pat Williams *Congressional Record,* March 29, 1990 25

Corn, Morton. "Exposure Assessment Challenges Presented by Investigations of Reproductive Effects in the Semiconductor Industry", Ch. 14 in forthcoming ACGIH publication. 13, 25

Duncan, Allyson K. "Fetal Protection and the Exclusion of Women From the Toxic Workplace", Vol 18 *North Carolina Central Law Journal No. 1, (1989).* 11

Encyclopedia of Occupational Health and Safety (Parmeggianni, L. ed. 1983), International Labour office, Geneva Switzerland, 2nd. Ed. 1985.....passim

Equal Employment Opportunity Commission, "Policy Statement on Reproductive and Fetal Hazards Under Title VII" *Fair Employment Practices Manual (BNA) 401:6013* 14

Grad, Frank P., *Public Health Law Manual*, American Public Health Association, Washington., D.C. (1990). . 17, 18

Lowrence, W.W., *Of Acceptable Risk: Science and the Determination of Safety*, William Kaufman, Inc., Los Altos, Ca. (1976). 14

Occupational Safety and Health Administration Notice on Issuance of Final Standard for Workplace Exposure to Lead, *Federal Register* 43 FR 52952 November 14, 1978. 21

HR 4420, 101st Congress, 2d Sess., (1990) "The Employee Protection Act of 1990", introduced by Rep. Pat Williams, (D-Montana) 25

Smith, Neal and Baram Michael, The Nuclear Regulatory Commission's Regulation of Radiation Hazards in the Workplace: Present Problems and New Approaches to Reproductive Health, 13 *Ecology L. Q.* 879 (1987). 19

Thompson, W. Gilman, *The Occupational Diseases: Their Causation, Symptoms, Treatment and Prevention*, Appleton & Co. New York, New York (1914). . . passim

U.S. Congress, Office of Technology Assessment Preventing Illness and Injury in the Workplace (1985). 14, 15, 16,

U.S. Congress, Office of Technology Assessment, Reproductive Health Hazards in the Workplace (1985). 13, 19

INTEREST OF *AMICUS CURIAE*

The *Industrial Hygiene Law Project* is a group of professionals who are concerned about legal issues pertaining to the practice of industrial hygiene. It was founded by Margaret Levin Phillips, Ph.D., M.H.S., an industrial hygienist employed in the manufacturing sector. Dr. Phillips anticipates that she will be involved in the design and implementation of fetal protection programs because of her professional expertise. She has worked in laboratory and manufacturing facilities while she was pregnant or contemplating pregnancy. Cheryl E. Amana is a J.S.D. Candidate at Columbia University School of Law. Ilise L. Feitshans, (Assistant Director of the Legislative Drafting Research Fund at Columbia University School of Law) serves as legal counsel for the project. Ms. Feitshans is also a doctor of science candidate in public health.

SUMMARY OF ARGUMENT

Title VII was written by the U.S. Congress to prevent the harms, caused by discrimination in the workplace, that arise because of unfounded sexual stereotypes and racial prejudice that has its origins in social and economic factors beyond the scope of employment. Title VII was not designed to address issues of health and welfare. Cases that have tested the limits of its jurisdiction have consistently deferred to facially discriminatory policies, when they have been supported by a health and welfare rationale.

If one accepts the notion that fetal protection policies constitute prima facie discrimination, employers will be compelled to allow women into high risk workplaces, without the benefits of risk assessment,

medical surveillance or other scientific evidence that health-related administrative agencies, can best review. Similarly, excluding all women of child-bearing capacity from such high-risk employment requires unduly stretching the narrow exceptions in Title VII, inconsistent with case law and its legislative history, and also without providing employers or employees the benefits of sound scientific evaluation of conditions on a case-by-case basis. Neither approach provides a viable solution to high-risk exposures that may affect men and/or women, or answers the immediate need to protect fetal health.

Each of those approaches is antithetical to good industrial hygiene practices (outlined below) and sound public health strategies articulated in public health laws. Such preventive strategies typically categorize individuals in sub-groups according to risk in order to prevent avoidable or foreseeable harms. Under the doctrine of *parens patriae*, state and federal governments have consistently recognized the need on occasion to abridge or modify legal views of individual rights, in order to preserve the public health. Examples abound, including but not limited to: abrogation of privacy rights in order to collect and preserve personal data in vital records, (births, deaths and specified diseases); restriction of the person, in cases of quarantine; and restriction in the use of private property without constituting a "taking" in cases of zoning to prevent pollution or public nuisances. Federal law regulations also exist that divide groups of workers according to sub-populations. For example, the Nuclear Regulatory Commission (NRC) has different standards for workers under age 18 compared to other workers. NRC has also proposed regulations that have

different standards for the general public, for exposed employees, and for "fetal exposure" in the event of so-called "declared pregnancy".

The U. S. Congress has spoken to these important occupational safety and health issues in two regards: First, the Occupational Safety and Health Act of 1970 grants the Secretary of Labor authority to protect workers "functional capacity" against "recognized hazards", including reproductive health hazards in the workplace. This Respondent has not violated the relevant OSHA lead regulations, nor been cited by OSHA for unacceptable practices regarding reproductive health hazards. And, contrary to Petitioner's view of health concerns, weaknesses in OSHA regulations and the agency's reluctance to grapple with these issues should not give rise to the inference that OSHA is not the proper avenue for jurisdiction of these important issues. Rather, there is ample precedent for OSHA to play a more active role in this area without passing judgement on Title VII Civil Rights claims. Second, Rep. Pat Williams (D.-Montana) has introduced new legislation in the U.S.Congress on this subject. He has stated his intention to hold hearings (as indicated in the *Congressional Record*) pending the outcome of the case at bar. These considerations require judicial restraint, in deference to the expressed will of the legislature, so that these issues may be resolved under OSH Act or by new legislation.

In conclusion, this Court therefore need not reach Title VII's constitutional issues in order to uphold the decision of the Court of Appeals in this case, applying different reasoning but agreeing with the result.

ARGUMENT

I. Title VII Does Not Adequately Address the Problems Raised by Fetal Protection Policies

A. Title VII Was Not Designed to Address Issues of Health and Welfare

Title VII of the Civil Rights Act was written by the U.S. Congress to prevent the harms, caused by discrimination in the workplace, that arise because of unfounded sexual stereotypes and racial prejudice that has its origins in social and economic factors beyond the scope of employment. By contrast, problems of fetal protection due to occupational exposure to reproductive hazards are matters within the employer's direct control. In enacting Title VII, Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431; *Dothard v. Rawlinson* 433 U.S. 321, at 328 (1977). Section 703(a) of Title VII, 42 U.S.C. Section 2000e-2(a) provides: "(a) Employer practices. It shall be an unlawful employment practice for an employer "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

In *International Union of United Auto Workers (IUAW) v. Johnson Controls,* 886 F2d 871 (7th Cir. 1989) Petitioners argued that any Fetal Protection Policy constitutes *prima facie* discrimination in violation of Title VII, because it prohibits employment of fertile women in high-exposure jobs in lead battery production. It is undisputed that lead is one of the most dangerous environmental toxins and that transplacental transfer of lead in a pregnant woman to her unborn child can cause a significant risk of damage. Lead, stored in the body of a non-pregnant woman, can affect her children years after her exposure. The expense of defending the company against liability in tort suits brought by harmed children, the defense argued, constituted a "business necessity" defense and also a Bona Fide Occupational Qualification (BFOQ) exception to Title VII, based on the "fundamental" differences between the sexes. The lower court agreed.

Cases that have tested the limits of Title VII jurisdiction have consistently deferred to facially discriminatory policies, when they have been supported by a health and welfare rationale. *Dothard v. Rawlinson* 433 U.S. 321 (1977) represents the far limit upon the scope of Title VII jurisdiction in matters of job safety and health; but the case does not even offer the pretense of an interest in the scientific underpinnings for its health and welfare rationale. Title VII's concern for the job-relatedness of criteria based on height and physical strength, as discussed in *Dothard*, was ultimately proven

to be less important than the personal and systemwide security concerns raised by having a female guard in a maximum security prison. Thus, the justification for BFOQ in *Dothard* was rooted in a concern for occupational health and safety in the broadest sense, but does not offer criteria or guidelines for resolving the occupational health issues that it touched upon but could not resolve. Other cases that discuss the disparate impact of employment practices regarding differing medical benefits based on pregnancy *Nashville Gas Company v. Satty*, 434 U.S.136 (1977) or women's ostensibly greater longevity, *City of Los Angeles v. Manhart*, 435 U.S.702 (1978) concern health policy-related issues, but the health and welfare aspects of these cases do not venture beyond the economic impact of unequal medical or insurance coverage for different classes of employees.

Petitioners have confused the notion of "risk" applied in the context of actuarial tables, as discussed in *Manhart,* with the concept of "risk assessment" pursuant to sound principles of industrial hygiene, stating, " While the theoretical *risk* of fetal cognitive deficit may exist whenever a fertile woman is exposed to lead, only a *small percentage* of the exposed women will become pregnant, and only a *small percentage* of their offspring will be adversely affected. [citation omitted] Thus, however, one quantifies the numbers and evaluates the risks, the only *certainty* is that the large majority of women ... lose employment solely because of their status as a woman and not because of any fetal injury caused by their employment." *Brief For Petitioners,* Docket No. 89-1215, pp.21-22, emphasis supplied.

This is not practical or sound public health policy.

If one accepts the notion that fetal protection policies constitute *prima facie* discrimination, employers will be compelled to allow women into high risk workplaces, without the benefits of risk assessment, medical surveillance or other scientific evidence that health-related administrative agencies can best review.

Similarly, excluding all women of child-bearing capacity from such high-risk employment requires unduly stretching the narrow exceptions in Title VII, inconsistent with case law and the law's legislative history, and also without providing employers or employees the benefits of sound scientific evaluation of conditions on a case-by-case basis. Noting that "there is no legal or logical impediment to" including fetal protection policies within the scope of the BFOQ exception, as "an essential element of business operations", the Equal employment Opportunity Commission (EEOC) therefore concluded in its Brief in Support of Petitioners that "In our view, the contention that a BFOQ defense is absolutely unavailable for a sex-based fetal protection policy thus reflects a misreading of the BFOQ provision of Title VII" *Brief of EEOC, Amicus Curiae* in support of Petitioners, Docket No. 89-1215, at pp. 16-18.

Neither approach, however, evaluates the relevant scientific evidence pertaining to the availability of industrial hygiene practices, or engineering controls preventing harm to reproductive capacity or fetal harm. An approach based on (1) complete exclusion of female workers of childbearing age and capacity, or (2) alllowing all workers to obtain employment without regard to particular high-risk exposures runs the greater

risk of paying nominal deference to discrimination concerns, without affording any workers adequate industrial hygiene protection. Each of those approaches is therefore antithetical to good industrial hygiene practices and sound public health strategies. Neither the approach offered in behalf of the Petitioners, by EEOC as amicus, nor the Petitioner's approach provides a viable solution to high-risk exposures that may affect men and/or women, or answers the immediate need to protect fetal health. This important distinction between the reach of Title VII protections and the scope of occupational health problems makes Title VII inapposite in the context of Fetal Protection Policies: agencies that enforce equal employment laws lack the scientific expertise to effectively prohibit practices that jeopardize workers' health.

B. Title VII's BFOQ and "Business Necessity" Defenses Are Inapposite When Analyzing Risks of Reproductive Harm

This Court has long held that a policy with a disparate impact can be justified by "business necessity". Title VII's sole statutory exception is the Bona Fide Occupational Qualification, (BFOQ). The standards for applying the BFOQ were most recently discussed by this Court in *Price Waterhouse v. Hopkins* 109 S.Ct. 1775, (1989). The *Price Waterhouse* plurality's analysis of the BFOQ exception indicates that although an employer's policy or practice may appear discriminatory on its face or in its outcome, the employer will not be held liable for violations of Title VII's prohibition against discrimination if it can be proven that gender was only

one of several factors in an employment decision, and that the employer would have reached the same decision absent consideration of the prohibited information pertaining to gender, because, "To begin with, the existence of the BFOQ exception shows Congress' unwillingness to require employers to change the very nature of their operations in response to the statute," *Id.*

The fact that there are indicia of sex-based discrimination is not determinative if the result would have been the same had the impermissible criteria not been applied under this standard. Since neither employers nor employees can be presumed to desire fetal harm as an outcome of employment decisions, fetal protection through the exclusion of women would be considered a BFOQ because the risk of fetal harm is an important factor other than sex, that affects normal business operations. It could therefore be argued that the desire to prevent fetal harm falls within the parameters of non-discriminatory grounds for employers' exercise of their "freedom of choice" in making decisions under *Price-Waterhouse*. This approach could be overinclusive, thereby denying employment to people whose workplace exposures do not require the restricted exposures in fetal protection policies.

Application of the *Price Waterhouse* plurality's analysis of the BFOQ to the Pregnancy Discrimination Act, 42 U.S.C. 2000-e(k) would similarly provide a strong basis for showing that fetal protection policies are not based upon "distinctions involving pregnancy [which] are mere pretexts designed to effect an invidious discrimination against members of one sex or the other.'" 429 U.S., at 135 (quoting *Geduldig v. Aiello*, 417

U.S. 484, 496-497, n.20 (1974)). Thus, Title VII could permit irrational policies as easily as justified exclusionary polices under this construct, without requiring adequate scrutiny of the underlying scientific evidence.

C. Title VII Precedents Regarding Fetal Protection Do Not Adequately Address the Problems Raised by Reproductive Health Hazards in the Workplace

The lower court approved the fetal protection policy at Johnson Controls as an acceptable approach to reducing the risk of birth defects, such as brain damage and irreparable impairment of the central nervous system, in children of female employees. Prior cases have debated the application of Fetal Protection Policies in the courts. Overall, courts have accepted the notion that such policies provide "necessary" protection, despite their economic harms to women and their implications for future harm to workers' functional capacity. When the lower court looked for standards to determine the reasonableness of the policy, it sought a rationale to justify the perception of potential harm, and evidence of the existing harm to excluded employees, following the criteria in *Wright v. Olin* 697 F.2d 1172 (4th Cir., 1982).

In *Wright,* women who were employed at lower-exposure worksites were not penalized from the standpoint of pay and seniority rights, compared to the benefits afforded to male workers in the high-exposure worksites, but women were excluded from specific "restricted" job categories. No employees were required

to be sterilized to obtain or maintain employment. The Fourth Circuit therefore held that the employer's exclusionary "Fetal Vulnerability Policy" was "rational" and not discriminatory, in light of "medical evidence" that women should be excluded from restricted areas where there were embryotoxins and chemicals that can cause reproductive harms, so long as the women were given counseling and could work elsewhere.

According to one commentator, "traditional Title VII theory has proved inadequate to the analysis of the issue", Duncan, Allyson K. "Fetal Protection and the Exclusion of Women from the Toxic Workplace" Vol 18 *North Carolina Central Law Journal No. 1, (1989).* at 68. Courts have consistently found that although such policies may appear to be discriminatory, exclusionary policies do not comport with our legal standards for discrimination and that such policies therefore may continue with minimal scrutiny of their scientific underpinnings. The *Wright* court focussed its inquiry on potential harm to the employer and the unborn as weighed against the existing economic harm to excluded employees. The court upheld the employer's exclusionary policy, stating:

> "it is not necessary to prove the existence of a general consensus... within the scientific community. It suffices to show that within that community there is so considerable a body of opinion that significant risk exists... that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one" *Wright v. Olin* 697 F.2d 1172 (4th Cir., 1982).

This standard, as articulated in *Wright*, restated in *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984) and applied by the lower court could be applied to situations where the risk of reproductive or other harms is, at best, speculative. More importantly, this vague statement regarding the employer's responsibility to employees does not subject to judicial scrutiny the employer's underlying scientific evidence and methods for reducing the risks. Any exclusionary policy, regardless of its harsh provisions, or the large class of workers that are affected by it, could be justified under this view.

The view, were the lower court's opinion to be upheld, leaves two nagging questions at each of the policy's logical extremes: (1) the minimum requirements for demonstrating to the court that an exclusionary policy, in lieu of alternative protections, is justified remain unclear and (2) the circumstances that would place limits on the court's criteria, to determine when an exclusionary policy goes too far are also unknown. This gives no blueprint for drawing a distinction between impermissible harms that threaten workers' health, but must be corrected immediately through engineering controls, in contrast to cases where the employer's policy can be justified, although discriminatory in its effect. More importantly, this standard does not place a clear limit on employer policies that may unfairly harm workers, even though such policies may constitute a breach of the employer's responsibilities to protect workers.

D. Occupational Health Issues, Unlike Policies that Prevent Discrimination, Require a Careful Weighing of Epidemiological Evidence on a Substance by Substance and Worksite by Worksite Basis and EEOC Lacks This Expertise.

Reproductive hazards encompass all agents which have an adverse effect on the ability to sire or conceive and bear healthy offspring, U.S. Congress, Office of Technology Assessment, *Reproductive Health Hazards in the Workplace Washington D.C. 1985*. A complete analysis of possible reproductive impairment must include: disturbances in ovulation and spermatogenesis; male sexual dysfunction; pregnancy loss at all gestational stages; developmental defects of fetus or infant; genetic defects; low birth weight; and other abnormalities in infancy and childhood. Morton Corn, "Exposure Assessment Challenges Presented by Investigations of Reproductive Effects in the Semiconductor Industry", Ch. 14 of forthcoming American Conference of Government Industrial Hygienists (ACGIH) publication. As noted by Dr. Corn, Former Assistant Secretary of Labor for Occupational Safety and Health, there are three major types of adverse effects that may be considered the endpoints for evaluation of reproductive hazards after occupational exposure: (1) Subfertility/ Infertility; (2) Pregnancy loss; and (3) Disorders at birth or in infancy Id. For example, effects on breastfeeding, early childhood development and even learning disabilities may be included as potential outcomes to be studied.

Risk assessment attempts to describe the causal relationship between adverse effects and environmental factors such as chemicals, radiation, stress, and

pathogens, Lowrence, W.W., *Of Acceptable Risk: Science and the Determination of Safety*, William Kaufman, Inc., Los Altos, Ca. (1976). Reliance is placed upon toxicological and epidemiological studies which relate specific agents to adverse outcomes. U.S. Congress, Office of Technology Assessment, *Preventing Illness and Injury in the Workplace,* Washington D.C. 1985, Ch. 3.

The objective of risk assessment is not simply to identify a connection between a hazardous agent and an adverse effect. Exposure to the agent must be quantified in the form of a measurable index such as air contaminant concentration, absorbed dose, or blood chemistry. The nature and severity of effects is characterized at varying levels of exposure, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*, Washington, DC , 1985, Ch.3.

On October 3, 1988, the EEOC issued a Policy Statement on Reproductive and Fetal Hazards Under Title VII, which essentially endorsed the Wright-Hayes view, despite the weakness of the guidance from these cases, "Policy Statement on Reproductive and Fetal Hazards Under Title VII" *Fair Employment Practices Manual (BNA)* 401:6013. The EEOC criteria for a fetal protection policy, as restated by the lower court can be summarized as: (1) substantial risk of reproductive harm; (2) risk via exposure of one sex but not the other sex; and (3) ability of the policy to eliminate risk, *IUAW v. Johnson Controls*, 886 F2d 871 at 886. These criteria do not reflect the quantitative aspect of scientific risk assessment, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*,

Washington, DC 1985, Ch.3. Furthermore, risk assessment could not be easily reviewed by a court without prior administrative review by an agency that has expertise in the application of scientific evidence to occupational health criteria. Using the results of such analysis without considering the scientific context in which they were developed could cause equal or greater harm than the risk to be avoided.

The lower court noted, however, that EEOC has indicated that a fetal protection policy would not withstand scrutiny "if it is shown that there exists a reasonable alternative policy that will protect employees' offspring... that has a less discriminatory impact on employees of the restricted sex." *IUAW v. Johnson Controls,* 886 F2d 871 at 886. Application of industrial hygiene controls would constitute such an alternative, but could not be easily evaluated by an administrative agency that is not familiar with issues of occupational safety and health.

Sound industrial hygiene practice recognizes a hierarchy of controls to reduce or eliminate workplace hazards, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*, Washington, DC 1985, Ch.3. The preferred approach, where feasible, is to redesign a work process to eliminate or reduce hazards by substituting materials, curtailing harmful emissions, or isolating the worker from the hazardous process.

The next option is work practice controls, which involve training employees to work more safely, or administrative controls, which limit the duration of an

employee's exposure. Fetal protection policies that are designed to minimize the risk of harm to employees' reproductive capacity can be developed within the parameters of sound industrial hygiene practice. Using exposure monitoring, medical surveillance and enhanced industrial hygiene controls, it is possible to create alternatives for control. A final resort is the use of personal protective equipment such as respirators. The rationale for this hierarchy is a preference for the most reliable method among feasible controls, U.S. Congress, Office of Technology Assessment *Preventing Illness and Injury in the Workplace*, Washington, DC , 1985, Ch. 9.

The ability to implement any good industrial hygiene program depends upon the hygienist's ability to tailor required programs to the substances, exposures and working population in a given workplace, *Id.* Feasibility depends upon the configuration of the workplace; the cost and availability of necessary technology; the effectiveness of worker training; and the willingness of the employer to commit resources toward developing new control technology, *Id.* Recognizing that the feasibility of controls is not a static parameter, men and women of reproductive capacity who have occupational exposure to reproductive hazards would be enrolled in programs that meet their individual needs.

These particularly sensitive matters require that an administrative agency weigh sophisticated scientific evidence reflecting the different exposure experience of each worksite within a given workplace, as well as the reproductive history and needs of the affected employees. Title VII is not, however, amenable to undertaking this non-economic, health-based risk

assessment and detailed exposure analysis and EEOC lacks the expertise to evaluate the appropriate application of industrial hygiene controls in specific circumstances.

II. Government Authority Exists to Protect Reproductive Health Without Reaching Title VII's Civil Rights Issues

A. The Government's Obligation To Protect Health Has Primacy Under the Doctrine of *Parens Patriae*.

Public health preventive strategies typically categorize individuals in sub-groups according to risk in order to prevent avoidable or foreseeable harms. The governmental authority to abridge or modify individual rights in order to fulfill its duty to ensure the public health is a fundamental tenet of the common law, Grad, Frank P., *Public Health Law Manual*, American Public Health Association, Washington., D.C. (1990); 39 American Jurisprudence 2d Health Secs. 20;22 (1968 & Supp. 1990). Under the doctrine of parens patriae, state and federal governments have consistently exercised these rights in order to protect the public health and welfare, *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905). Preventive measures under these laws require consideration of relevant scientific evidence and evaluation of the risks to sub-populations, followed by a targeted approach focussing on high-risk populations, in order to justify such actions.

Examples of the governmental interest in meeting the recognized need to abridge or modify legal views of

individual protections, in order to preserve the public health include: abrogation of privacy rights in order to collect and preserve personal data in vital records, (births, deaths and specified diseases) Grad, Frank P., *Public Health Law Manual*, American Public Health Association, Washington., D.C. (1990); restriction of the person, in cases of quarantine [Id.]; and restriction in the use of private property without constituting a "taking" in cases of zoning to prevent pollution or public nuisances *Euclid v. Ambler Realty* 272 U.S. 365 (1926). These examples support the principle that policies that may appear at first blush to be of questionable constitutionality can override other statutory provisions, because of the primacy of policies that favor public health. Consequently, fetal protection policies, which may appear to have a disproportionate impact upon potential parents, women or pregnant women in particular, may be allowed subject to regulation and careful administrative scrutiny because of their ultimate impact upon broader societal issues affecting children and their parents' reproductive health.

B. There is Precedent in the Federal Law Providing Special Occupational Health Regulations for Fetal Protection.

Federal law also provides precedent for regulation of reproductive hazards according to sub-population. For example, the Nuclear Regulatory Commission (NRC) has separate standards for persons under age 18, limiting the allowable radiation exposure of such persons to ten percent of the exposure allowed for older persons. 10 CFR 20. 104 (a). NRC has proposed regulations, effective January 1991 for the

general public, 10 CFR 20.301, and for "fetal exposure" in the event of so-called "declared pregnancy", 10 CFR 20.208, "Dose for the embryo/fetus". See: Smith, Neal and Baram Michael, The Nuclear Regulatory Commission's Regulation of Radiation Hazards in the Workplace: Present Problems and New Approaches to Reproductive Health, 13 *Ecology L. Q.* 879 (1987). These standards for special sub-populations differ from the standards applied to other employees, 10 CFR 20.101-03. 10 CFR 20.208 shows the effect of applying specialized agency expertise when establishing an exposure standard. For example, 10 CFR 20.208 (c) states that "[t]he dose to an embryo/ fetus shall be taken as the sum of... (1) the deep dose equivalent to the declared pregnant woman and (2) the committed effective dose equivalent assessed to the pregnant woman due to the intake of radionuclides, modified to take into account any established parameters that cause the dose to the embryo/ fetus to be different from that of the declared pregnant woman", U.S. Congress, OTA *Reproductive Health Hazards in the Workplace, p.405*. This standard clearly cannot be analyzed or applied with a broad brush approach that affects more than a few workers at a time.

The NRC's multi-tiered approach to radiation hazards, by classification of workers into sub-populations as described above, has not been challenged as discriminatory to date. The NRC's approach does establish however, that a series of occupational health standards can be promulgated under federal laws that are tailored to the needs of subpopulations. This Court therefore need not reach Title VII's constitutional issues in order to uphold the decision of the Court of Appeals in this case.

III. The US Congress Has Clearly Expressed Its Intention to Address these Issues

A. There Exists Jurisdiction Under OSH Act For the Secretary of Labor to Resolve These Issues

The U. S. Congress has spoken to these important occupational safety and health issues in the Occupational Safety and Health Act (OSH Act) of 1970. OSH Act grants the Secretary of Labor authority to protect workers "functional capacity", Sec. 2(b), 29 U.S.C. 651 (b) against "recognized hazards", Sec. 5(a)(1), 29 U.S.C. 654. By case law and OSHA's own rulemaking in the OSHA lead standard, 29 CFR 1910.1025, the protections within OSHA's statutory mandate include reproductive health hazards in the workplace.

OSH Act Section 5(a) (1), the so-called "general duty" clause, requires that "Each employer (1) shall furnish to each of his (sic) employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his (sic) employees", 29 U.S.C. 654 (a)(1). To meet the employer's obligation or "general duty" to provide safe and healthful employment, employers must maintain an effective industrial hygiene program that is active in two complex realms, simultaneously monitoring conditions in the workplace and research within the scientific community. It is incumbent upon the employer to become aware of the most recent developments; for employers to use the latest and most effective means for protecting against special harms, and to use this information to ameliorate working conditions.

OSH Act also grants the Occupational Safety and Health Administration, (OSHA) the authority to investigate hazards; assist in developing strategies to improve working conditions; and assisting small businesses with compliance.

This Court has held that the U.S. Congress did not intend OSH Act compliance to depend upon the results of cost-benefit analysis, *American Textile Manufacturers Institute v. Donovan,* 452 U.S. 490 (1981). Unlike Title VII's "business necessity" defense, OSH Act has no monetary limitations on the costs of engineering controls, biological of monitoring or other industrial hygiene practices that can be required to enforce occupational safety and health laws, (although variances can be granted by the agency on a case by case basis). This underscores the sharp scientific differences between OSH Act and Title VII, and the need to reaffirm OSHA's primacy in crafting regulations that govern the employers' policies, in order to uphold occupational safety and health.

In the preamble to its final standard for occupational exposure to lead, OSHA recommended that prospective parents maintain blood lead levels below 30 micrograms per 100 grams, "Occupational Safety and Health Administration Notice on Issuance of Final Standard for Workplace Exposure to Lead," *Federal Register* 43 FR 52952 November 14, 1978. et. seq. This level represents the upper range of normal blood lead levels for adults who do not have occupational exposure to lead, according to the American Conference of Government Industrial Hygienists, *Documentation of the Threshold limit Values and Biological Exposure Indices* 5th

Ed., Cinn. Ohio 1986. OSHA asserted, without substantiating its statement, that the 30 microgram per 100 gram limit would "minimize" reproductive harm, 43FR52952 et seq. Yet, this level is the upper limit of the acceptable range, recommended by the Centers for Disease Control, National Academy of Sciences and the Environmental Protection Agency: ".. the blood lead level in children should be maintained below 30 micrograms per 100 grams with a population mean of 50 micrograms per 100 grams. Levels above 30 micrograms per 100 grams should be considered elevated" and therefore subject to medical controls, [Id.].

Using this approach, OSHA did not develop express protections for prospective parents employed in the lead industries. The medical removal requirements of the lead standard are triggered by blood lead levels of 50 micrograms per 100 grams or by medical determination "that the employee has a detected medical condition which places the employee at increased risk of material impairment to health from exposure to lead" 20 CFR 1910. 1025(k)(1)(ii)(A). OSHA's lead standard therefore permits but does not require medical removal or special protective measures for prospective parents under a broad interpretation of this rule. In addition, the need to prevent an imminent danger of fetal harm could be viewed as an "increased risk of material impairment to health" that would trigger protections articulated in this rule. Thus, OSHA did not clearly address the issues of fetal protection that it discussed and regulated in the final lead standard, but could concievably enforce special protections against prenatal exposure in cases of high-risk, without causing undue exclusion of large classes of employees.

To do so would be consistent with OSHA case law, directing the employer to prevent the effects of "recognized hazards" of lead under Section 5(a)(1) of OSH Act, 29 U.S.C. 654, and under *ASARCO v. OSHRC* 746 F.2d 483, (9th Cir. 1984). In an otherwise exacting standard, such indirection regarding fetal protection inhibited fulfillment of OSHA's mandate to protect working men and women from impairment of functional capacity because of lead exposure. This weakness in OSHA's regulatory approach should not be used to undermine its jurisdiction.

The Respondent has not violated the relevant OSHA lead regulations, or been cited by OSHA for unacceptable practices regarding reproductive health hazards. And, contrary to Petitioner's view of health concerns, weaknesses in OSHA regulations and the agency's reluctance to grapple with these issues should not give rise to the mistaken inference that OSHA is not the proper avenue for jurisdiction of these important issues.

It would cause needless duplication of governmental regulatory efforts and undermine administrative concepts of deference to the agency's legislative mandate for EEOC to acquire the necessary expertise to enforce the case by case protections against high-risk exposures. The proper avenue for redress against exclusionary policies therefore lies under OSH Act's enforcement mechanism. Unlike purely economic job-related discrimination which looks to societal factors beyond the worksite, exclusion of women of childbearing capacity is directly related to the employer's decisions regarding the hazards that will exist within the

workplace. Since reproductive hazards in the workplace are under the employer's control, under OSH Act, the cost of compliance is not a defense. Under OSH Act, employers can be required to clean up the workplaces. By contrast, there is no Title VII precedent that specifically requires employers to provide safe and healthful workplaces. These important differences between Title VII and OSH Act's administrative authority can dramatically change the outcome of litigation concerning exclusionary policies. The time and resources that have been used to bring cases under Title VII against exclusionary policies could therefore be better used to petition OSHA for effective enforcement of the existing regulations and its statutory mandate to resolve this important problem.

B. The US Congress Has Expressed Its Intention to Create Special Legislation to Address Reproductive Health Hazards and Judicial Restraint Requires that Courts Defer to the Legislature to Fill Any Regulatory Void In Existing Laws

Given that the potential for fetal harm also raises issues that traverse the traditional realm of industrial hygiene, which is usually limited to monitoring exposures within the workplace and outcomes that directly affect workers themselves, it is possible that reproductive health hazards in the workplace may in fact present new issues of law that require special legislation, beyond the scope of ordinary occupational health jurisdiction. Questions raised by fetal protection may therefore be best resolved through the development of new legislation

that specifically targets reproductive health hazards.

Rep. Pat Williams has introduced draft legislation on this subject, and has stated his intention to hold hearings as indicated in the Congressional Record, pending the outcome of this case. According to Rep. Williams' comments, printed in the Congressional record [Congressional Record, March 29, 1990, "Sterilization or Your Job", comments by Hon. Pat Williams, (D-Montana) introducing HR4420, the "Employee Protection Act of 1990" has the stated purpose to address the issues raised by Johnson Controls. Rep. Williams stated,

> "This legislation is partially in response to Johnson Controls... I intend to urge my chairman to hold hearings on this bill this year, but not to consider this legislation until after the Supreme Court issues its opinion in 1991".

The difficult scientific and epidemiological questions raised by fetal protection may best resolved through the development of new legislation that specifically targets reproductive health hazards. It is therefore possible that the special issues raised by reproductive health hazards emanating from the workplace but affecting the health outcomes discussed by Dr. Corn, can only be resolved by a special statutory mechanism that will evaluate reproductive hazards on a much narrower basis than the present dichotomy between exclusion or allowing all workers to enter the high-risk workplace Corn, Morton. "Exposure Assessment Challenges Presented by Investigations of Reproductive Effects in the Semiconductor Industry", Ch.

14 in forthcoming ACGIH publication.

Rep. Williams' comments implicitly raise the question whether the courts in general, and Title VII actions in particular, provide the proper avenue for making determinations regarding fetal protection policies, in light of their important health and safety questions and their ultimate impact upon the maternal and child health and welfare of future generations. It is possible that the decisions to be made in the realm of fetal protection are inherently political, and therefore should be resolved by the legislature through new laws that specifically target reproductive hazards and directly address issues that were not discussed in the legislative history of OSH Act or Title VII. Such legislation could further enable one agency to acquire the necessary expertise and develop the criteria for risk assessment and review of employers' claims regarding the ostensible justification for exclusion, by sorting out the differences between scientific evidence that genuinely involve high-risk exposures to lead, teratogens or other fetotoxins, and the adverse impact of stereotypes upon employment opportunities. In addition to facing a higher level of OSHA scrutiny until the workplace as been made safer, it may also be possible to set statutory limits upon the employer's expense for compliance, or could provide avenues for review of complaints and class actions pertaining to the validity of fetal protection policies in light of the dangerous exposures and risk assessment in specific circumstances.

This rare pronouncement by the legislature prior to the completion of a judicial opinion provides a powerful argument favoring judicial restraint and

allowing for the issues raised in a case to be considered by a legislature; such a clear legislative directive is unprecedented. These considerations require judicial restraint, in deference to the expressed will of the legislature that these issues be resolved under OSH Act or by new legislation.

IV. Conclusions

The judgement of the court of appeals should therefore be upheld.

Respectfully submitted,

Jack Levy,
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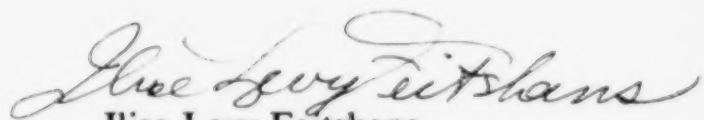

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